No. 11746

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

KURT H. KOEHLER and WILLIAM L. BREWSTER, as executors of the last will and testament and codicil thereto of Bertha Koehler, deceased, and as trustees under the last will and testament and codicil thereto of Bertha Koehler, deceased, and KURT H. KOEHLER in his individual capacity,

Appellants,

v.

TOM C. CLARK, Attorney General of the United States, as successor in office of James E. Markham, Alien Property Custodian, THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, a national banking association, and THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), a national banking association,

Appellees.

REPLY BRIEF OF APPELLANTS

Upon Appeal from the District Court of the United States for the District of Oregon.

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SUBJECT INDEX

AUTHORITIES CITED

STATUTES

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I.
INTRODUCTORY STATEMENT

The Custodian* asserted in the lower court that the two defendant banks had been improperly joined with the Custodian as defendants (R. p. 64). This was the sole ground upon which the District Court relied in dismissing the suit for want of jurisdiction (R. p. 78). Despite these facts the brief of appellee makes no attempt

*The term "Custodian" as used herein refers to the Alien Property Custodian and his successor, the Attorney General.

to sustain the action of the lower court in relying on the ground of improper joinder. We assume, therefore, that the Custodian now concedes that the lower court erred in relying on that ground and in holding that the joinder of the defendant banks was sufficient to deprive the court of jurisdiction to entertain a suit under Section 9(a) of the Trading with the Enemy Act. See *American Insurance Co. v. Scheufler,* 129 F. (2d) 143, 145 (C.C.A. 8, 1942).

The brief of appellee argues, in effect, that although the lower court erred in its reliance upon the joinder of the banks as defendants for its conclusion that the court was without jurisdiction, the result arrived at by the court was correct because upon other grounds it should be determined that the court was without jurisdiction.

In appellant's brief we discussed only the ground upon which the lower court relied, that is, the question of joinder. In this reply we will discuss the grounds on which appellee now relies in his assertion that the lower court had no jurisdiction.

As a matter of fact, we could not have anticipated the argument appellee now makes. We will develop in later pages that the grounds on which appellee now relies are different from any asserted by appellee in the lower court.

As a preface to the argument on the specific grounds now relied on by appellee, we concede the correctness of appellee's position, stated beginning at page 6 of his brief, that this suit against the Custodian is one against

the United States and that the lower court has no jurisdiction to entertain the suit unless authority for the suit can be found in Section 9(a) of the Trading with the Enemy Act. We will contend, however, that the suit is one authorized by Section 9(a) of the Act and, accordingly, that the lower court erred in dismissing for want of jurisdiction.

In the lower court appellee contended that the suit should be dismissed because

> " . . . It appears from the face of the complaint that the property which is the subject of the action has not been delivered or paid to defendant . . . Alien Property Custodian and that neither the Trading with the Enemy Act nor any other statute of the United States authorizes a suit against the . . . Alien Property Custodian for a declaration of the right and title of any persons . . . or for a declaration of the efficacy or validity of a vesting order issued by the Alien Property Custodian *until after the possession of the vested property is transferred, delivered or paid to the Alien Property Custodian.*" (Italics ours) (R. p. 61).

Thus the contention was made that the Vesting Order was broad enough to reach the corpus of the trust which, as the Vesting Order states, was then "in the process of administration by William L. Brewster and Kurt H. Koehler, as executors and trustees" (R. p. 46). Read with the Vesting Order the contention quoted above from page 61 of the Record was that no suit would lie under Section 9(a) until the corpus of the trust was physically in the possession of the Custodian.

That position is, we believe, disposed of by the

authorities which permit suits under Section 9(a) following a vesting order without physical transfer to the Custodian of the property described in the vesting order. The very making of a vesting order brings the property within the description in Section 9(a) of property "conveyed, transferred, delivered or paid to the . . . Custodian." *The Pietro Campanella,* 47 F. Supp. 374 (D.C. Md. 1942); *The Antoinetta,* 49 F. Supp. 148 (D.C. Pa. 1943), affirmed 153 F. (2d) 138, 143, certiorari denied 328 U.S. 863, 66 S. Ct. 1368, petition for rehearing denied 67 S. Ct. 31; *The Aussa,* 52 F. Supp. 927 (D.C. N.J. 1943), reversed on other grounds 153 F. (2d) 138, certiorari denied 328 U.S. 864, 66 S. Ct. 1370, petition for rehearing denied 67 S. Ct. 33; *The Brennero,* 53 F. Supp. 441 (D.C. N.J. 1944), reversed on other grounds 153 F. (2d) 138, certiorari denied 328 U.S. 864, 66 S. Ct. 1369, petition for rehearing denied 67 S. Ct. 32.

Appellee now has apparently abandoned this position taken in the court below that the trust res itself has been vested and that the physical transfer of the corpus of this trust is essential to sustain the jurisdiction of the court in this case. Appellee now changes to a different position. He now asserts that the only property vested was the "interest of Ilse Schloesser" in the trust (Appellee's Br. p. 11). He proceeds:

> "The Custodian might have vested the trust res itself, leaving to those non-enemies claiming an interest in that property the remedy of a suit for return under Section 9(a) of the Act. . . . But he did not. He vested only the right, title and interest of Ilse Schloesser." (Appellee's Br. pp. 11-12).

> " . . . If the trustees had any rights in the trust corpus they still have them. If Kurt H. Koehler was a contingent beneficiary of the trust he still retains his contingent interest. The vesting simply substituted the Alien Property Custodian for Ilse Schloesser, leaving all the remaining interests in the trust in status quo." (Appellee's Br. p. 13).

But although he now contends that the trust res has not been directly vested, the Custodian has not abandoned his position that by virtue of the Vesting Order he is entitled to possess and control the trust assets. This claim of the Custodian goes to the merits of this suit. The appellants assert that they have the right to possess and administer the trust assets and this suit was instituted to establish that right.

II.

THE EFFECT OF THE VESTING ORDER

A. The Interest of Kurt H. Koehler.

To understand fully the position of the Custodian it is essential to examine the pertinent portions of the Vesting Order, which for convenient reference we quote:

> "That the property described as follows:
>
> > All right, title, interest and claim of any kind or character whatsoever of Ilse Schloesser, and her heirs and distributees, in and to the estate of Bertha Koehler, deceased, and under clause 'Third' of the will of said Bertha Koehler, and paragraph (g) thereof per codicil dated July 11, 1933, including the right to demand from the executors of said estate and from the trustees

> under said will, payment and delivery of the principal and income of a certain trust fund, for which provision is made in said clause 'Third' of said will and said codicil thereto,
>
> is property payable or deliverable to, or claimed by, nationals of a designated enemy country, Germany, namely, Ilse Schloesser, and her heirs and distributees, . . .
>
> "That such property is in the process of administration by William L. Brewster and Kurt H. Koehler, as Executors and Trustees, acting under the judicial supervision of the Circuit Court of the State of Oregon for the County of Multnomah;
>
> . . . . . .
>
> "Hereby Vests in the Alien Property Custodian the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States." (R. pp. 45-46)

It must be noted that the Order (1) vests not only the interest of Ilse Schloesser but also the interests of her heirs and distributees; (2) determines that Ilse Schloesser and her heirs and distributees are enemy nationals and that the property vested is payable or deliverable to or claimed by said enemy nationals; (3) recites that such property is in the process of administration by the appellants as trustees; and (4) provides that the vested property is to be administered, liquidated, sold or otherwise dealt with by the Custodian for the benefit of the United States.

The Custodian has consistently taken the position that by virtue of the Vesting Order Kurt H. Koehler,

as a possible heir and distributee of Ilse Schloesser, is an enemy national and as such his interest in the trust, however contingent, has been vested. As an enemy national it has been urged that he is precluded from bringing suit except by a proper case filed under Section 9(a). This argument in effect was made by the Custodian in presenting his motion for judgment on the pleadings. This point was also the basis of the Custodian's third affirmative defense (R. p. 64). The Custodian now concedes that the appellants are not enemies or allies of enemies (Appellee's Br. p. 9), but he asserts that the interest of Kurt H. Koehler as a possible heir of Ilse Schloesser has not been vested (Appellee's Br. pp. 12-13). We will concur in that assertion, but this does not relieve the appellant trustees from the duty of protecting the interest of Kurt H. Koehler as a possible beneficiary of the trust and of conserving the principal and income of the trust and administering its assets. *Isenberg v. Trent Trust Co.* (C.C.A. 9, 1928), 26 F. (2d) 609, former opinion adhered to 31 F. (2d) 553, certiorari denied 49 S. Ct. 479, 279 U.S. 862.

B. The Right to Possess, Control and Administer the Trust Res.

As we have stated, the principal argument now urged by the appellee is that the property vested by the Custodian is not the trust res but the intangible interest of Ilse Schloesser, and as this is not a suit to recover that interest the court is without jurisdiction. We agree that

the Custodian has not directly vested the corpus of the trust, but this argument of the appellee ignores the effect of the Vesting Order as written and applied by the Custodian. The Custodian vested the alleged right of Ilse Schloesser to demand from the trustees payment and delivery of the corpus of the trust. That the Custodian deems the Order to have vested the right to possess and control the trust property is apparent from the recital in the Vesting Order that the vested property "is in the process of administration by William L. Brewster and Kurt H. Koehler, as Executors and Trustees." It is difficult to imagine trustees administering the intangible rights of a beneficiary—they administer the trust assets.

The Custodian has consistently demanded possession and control of the corpus of the trust (R. p. 77). His motion to dismiss (R. p. 61) was based upon the ground that the trust assets have not been transferred, delivered, or paid to him. If by virtue of the Vesting Order the Custodian has the right, as he claims, to possession of the trust res, he has vested a property interest which the trustees insist is theirs and which by this suit they seek to establish.

As the interest of Ilse Schloesser is measured or defined by the Custodian, this is a suit to establish the appellants' claim to a portion of that interest for it is a suit to determine the right of the trustees to hold and administer the trust property. The illustration employed by the Custodian on pages 14 and 15 of his brief does

not present an accurate picture. In this case, although the Custodian has vested an intangible interest in "Tract A" (the right of Ilse Schloesser), by his own interpretation and application of the Vesting Order he has also seized the right to possess and dispose of and receive the rents and profits from "Tract A" (the trust res). As the legal owner of "Tract A", the appellants have instituted this suit to establish their ownership of the property and their right to the continued possession thereof and to receive the rents and profits therefrom. Certainly this is a suit, within the language of Section 9(a), "to establish the interest, right, title" of appellants to a portion of the property seized by the Custodian.

III.

THIS SUIT UNDER SECTION 9(a) OF THE ACT AFFORDS THE ONLY EFFECTIVE REMEDY AVAILABLE TO APPELLANTS

At page 16 of his brief the Custodian suggests that appellants have two alternative remedies to establish their right to hold and administer the trust property, viz:

> "If they wish a speedy adjudication of the extent of the rights of Ilse Schloesser to which the Custodian has succeeded they may pay over the property which they have to the Custodian and sue for its return. This is an adequate remedy. *Stoehr v. Wallace,* 255 U.S. 239 (1921). Or, if they do not wish to surrender the *res* to the Custodian, they

> may wait until the Custodian seeks to assert his rights and then defend against him. But they cannot keep the trust property which they have and at the same time sue the Custodian to establish their interests in it."

With the exception of certain real estate, household furniture and jewelry (R. pp. 24, 63-64), the assets of the trust are held by the two defendant banks. Both banks have refused to deliver those assets to the appellant trustees, basing their refusal upon the belief that they are prevented from so doing by the terms of the Act (Appellants' Br. pp. 5, 6, 13, 14). These assets cannot be obtained by the appellants in the absence of a judicial determination, in a suit under Section 9(a), of the effect of the Vesting Order. The real estate is not in the control of the appellants in the sense that any act of appellants is necessary to transfer possession to the Custodian. If, as he maintains, the Custodian has vested the right to possess, hold and dispose of the real estate of the trust, that right has been transferred to him by the Vesting Order as completely as if by conveyance. *Commercial Trust Co. v. Miller,* 43 S. Ct. 486, 262 U.S. 51. Furthermore, appellants may very well breach their fiduciary obligation as trustees if by their conduct they cause a voluntary delivery to the Custodian of trust assets which they insist the Custodian has no right to possess and which he has not directly vested. *Isenberg v. Trent Trust Co.,* supra. It is not an answer to this suit, then, to say that the right of the Custodian to demand the trust res can be determined only after the appellants voluntarily transfer or cause a transfer

of the trust assets to the Custodian.

The proper method for the Custodian to assert his alleged right to possession of the trust property is by a suit under Section 17 of the Act. Such a suit is possessory in nature and defenses based upon the merits of the defendants' claim to the property cannot be urged. The sole remedy of the claimants is by a suit in equity under Section 9(a). 50 U.S.C.A., Appendix, Section 7(c); *Commercial Trust Co. v. Miller,* supra; *Central Union Trust Company v. Garvan,* 41 S. Ct. 214, 254 U.S. 554. Accordingly, appellants are in no position to defend a suit by the Custodian to assert his rights. In this connection is must be noted that the Act was amended on August 6, 1946, by the addition of Section 33, which reads in part as follows:

> "No suit pursuant to section 9(a) may be instituted after the expiration of two years from the date of seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought or from the date of enactment of this section, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9(a) or 32 hereof." (50 U.S.C.A., Appendix, Section 33).

This statute of limitations runs from the date of vesting or from the date of enactment, whichever is later. Thus, even though we were to assume that the appellants may defend, on the merits, a suit by the Custodian under Section 17 to enforce his demand for possession of the

trust property, the Custodian has not commenced such an action and cannot be compelled to do so (Appellee's Br. p. 16). Unless, therefore, the appellants act seasonably by prosecuting their own suit under Section 9(a) their claims will be outlawed. Certainly this is strong indication that Congress, by the enactment of Section 9(a) and Section 33, intended that claimants in the position of appellant trustees may bring a suit in equity under Section 9(a) to establish their interest in property demanded by the Custodian pursuant to a vesting order.

CONCLUSION

Appellants recognize that by the Vesting Order such rights as Ilse Schloesser had as a beneficiary of the trust became vested in the Custodian. We seek in this suit to have the court determine the extent of her rights and the consequent extent of the present rights of the Custodian. We seek to have the court "establish", to use the language of Section 9(a), that is, to define, the extent of the rights and obligations of the appellants as trustees and of Kurt H. Koehler as a contingent beneficiary of the trust.

There is no real reason why the suit should not be heard on its merits. Section 9(a) is to be broadly construed to give effect to its remedial purpose. *Becker Steel Co. of America v. Cummings,* 296 U.S. 74, 56 S. Ct. 15.

The relief prayed for by appellants may be granted

and this case disposed of quickly if appellee will concede that he has no right under the Vesting Order to demand, possess and control the trust assets. If he will not make this concession and the corollary concession that appellants, as trustees, are entitled to the possession and control of all assets of the trust, and to administer them as trustees, this suit should be heard on the merits.

This suit is within the language and spirit of Section 9(a) and for this reason as well as the reasons urged in our opening brief the appellants respectfully submit that the District Court erred in dismissing this case for want of jurisdiction.

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